Supreme Court, U.S.
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92-1343

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

Clifford J. Johnson, Petitioner
v.
White, Strankman, and Merrill, Respondents;
and Bank of America, Real Party In Interest.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner pro se.

43 pp

QUESTIONS PRESENTED

1. Whether a civil rights Plaintiff, who complains of drastic *procedural* due process deprivations due to nonjudicial or clerical mistakes made by state judicial officers, must, may, or must not have first exhausted remedies in the state courts.[1]

2. Whether a civil rights Plaintiff who complains of *substantive* due process deprivations by state judicial officers may sue those officers in their official capacities for prospective injunctive relief, when the issues raised have not already been adjudged in the state courts.[2]

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[1] *Case circumstances:* This court's applicable cases (*Parret v. Taylor*, 451 U.S. 527 (1980); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *Hudson v. Palmer*, 468 U.S. 517 (1984)) uphold that such a Plaintiff *must* have first exhausted his remedies in the state courts. The challenged decision of the Ninth Circuit, by affirming dismissal of the Complaint below, conversely holds that such a Plaintiff *must not* have first exhausted his remedies in the state courts. Petitioner requires only the determination that such a Plaintiff at least *may* have first exhausted his remedies in the state courts, as allowed in *England v. Medical Examiners*, 375 U.S. 411 (1963), *Haring v. Prosise*, 462 U.S. 306 (1983), and the Ninth Circuit's claimed authority, *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

[2] *Case circumstances:* By affirming dismissal of the Seventh and Eighth Counts of the Complaint below, the decision of the Ninth Circuit implicitly held that no such suit is allowable, contrary to this court's decisions in *Mitchum v. Foster*, 404 U.S. 225 (1972) and *Pulliam v. Allen*, 466 U.S. 522 (1984).

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REPORTS OF OPINIONS

No other courts or administrative agencies have delivered opinions in this case.

JURISDICTION

Pursuant to 28 U.S.C. §1254(1), Petitioner Clifford Johnson (hereafter "Petitioner") seeks a writ of certiorari to review the decisions of the Ninth Circuit Court of Appeals entered July 10, 1992 and December 10, 1992, which respectively denied his appeal filed October 11, 1991 (No. 91-16626), and his Petition for Rehearing and En Banc Suggestion filed July 27, 1992. (Appendices, pp. 39-42.)

This Petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rules, Rule 13.1.

CODIFIED PROVISIONS

Fourteenth Amendment to the Constitution of the United States:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

United States Code, Title 42, § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any . . . person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in . . . suit in equity, or other proper proceeding for redress.

American Declaration of the Rights and Duties of Man, art. XVIII (Organization of American States Res. XXX (1948)):

> Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violated any fundamental constitutional rights.

STATEMENT OF THE CASE

1. Introduction.

After thirteen years of litigation, this petition exhausts Petitioner's remedies in the state and federal courts.

Petitioner regrets the length of this statement of the case. To substantiate his Rule 10(a) claim, he must sufficiently explain departures from accepted and usual judicial proceedings so blatant and voluminous that they would seem incredible without specification, especially coming from a pro se litigant. Petitioner therefore details a long history of careless dismissals, in trial and appellate, state and federal courts.

Eight Counts are at issue. The Eighth Count alleges bias against Petitioner's pro se status in the state court. It also alleges that Petitioner represented himself as a matter of economic necessity, and so invidious discrimination against his lack of wealth is included in it.

Petitioner's October 11, 1991 appeal (No. 91-16626) in the Ninth Circuit was from a judgment of the United States District Court, Northern District of California, made final by order entered September 12, 1991. Said District Court judgment dismissed, for lack of subject matter jurisdiction, Petitioner's entire "Complaint for Prospective Injunctive Relief" (hereafter "Complaint"), filed August 15, 1991 (District Court case No. C-91-2625 MHP).

Jurisdiction was asserted under 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights), and 42 U.S.C. §§ 1983, 1988 (Civil Rights Act), and the American Declaration, art. XVIII (see pp. 28-29). The prayer, besides generally requesting further relief as deemed fit and proper, sought prospective injunctive relief in two parts: (**a**) to continue, without prejudice, four appeals dismissed by the California Court of Appeal without considering their merits, owing to that court's separate nonjudicial or clerical mistakes; and (**b**) to enjoin severe sanctions expressly promised by Defendants should Petitioner move to continue the state litigation.

2. The action in the state court.

The original suit in the state court (*Johnson I*[3]) included a defamation cause of action against the Real Party In Interest in the federal Complaint, namely, the Bank of America (hereafter "Real Party"). The Complaint alleges that the original action complained of false and malicious job references given to prospective employers of Petitioner, made by Real Party *after* termination his employment by Real Party. An exhibit to both the defamation complaint and the federal Complaint is an exemplary letter from Real Party to a prospective employer of Petitioner, providing the one-sentence job reference: "His separation was involuntary and his work was unsatisfactory."

The Complaint further alleges that, in the original action: (**a**) Petitioner's actual loss of employment offers due to the defamations had been established with strong preliminary evidence;[4] (**b**) it was admitted that Real Party had hired

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[3] *Johnson v. Bank of America*, San Francisco County Superior Court, case 765624, filed in 1980. The state appeals Petitioner seeks to reinstate are Nos. A032294, A033565, and A033591, all filed in 1985. (One of these appeals is from two orders, and constitutes two logically separate appeals.)

[4] Petitioner was without regular employment for eighteen months.

Petitioner to make efficiency recommendations, and had given Petitioner three consecutive first class performance ratings prior to his termination; (c) it was disputed as to whether Petitioner's numerical efficiency recommendations had been within reason, re two communications cited as cause for termination of employment; (d) it had subsequently been discovered that Real Party had validated and implemented both of these exact recommendations soon after his termination; and (e) testimony had been introduced plausibly showing falsification of corroboratory measurements submitted by Real Party to justify the publication that Petitioner's work was unsatisfactory.[5] Because willful misrepresentation automatically overcomes any possible employer privilege in making manifestly damaging publications,[6] and because any credible testimony is sufficient to try a disputed fact, the Complaint thus alleges that Petitioner had clearly established a *prima facie* triable cause of action for defamation, immune to summary judgment.

The Complaint further alleges that the state trial court, immediately before trial, granted Real Party's motion for summary judgment, and against binding precedent ordered Petitioner to pay for Real Party's pre-trial expert witness fees ($20,672),[7] and expressly refused to give any particular reasons for any of its decisions. The Complaint alleges that, under state law, only the state court of appeal is obliged to give a particular

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5 Petitioner competently testified that the purported measurements were scientifically impossible, and submitted corroborating technical documentation, excerpted from an IBM manual. The dispute equated to cost differences of about $7,250,000 (petitioner's estimate) versus $2,497.

6 Petitioner cited *Restatement of Torts* (2d) Ch. 26 §§ 600, 617, 619, inter alia.

7 These costs were most questionably incurred through Real Party's discovery. Real Party refused to specify a reason for paying $150 to a computer expert, and the other $20,522 was incurred through a 12-hour psychological examination of Petitioner by Real Party's agent. Real Party introduced no expert witness testimony in moving for summary judgment.

reason for the disposition of a cause. These facts plainly establish that Petitioner's right of appeal in the state courts was an essential, elemental procedural recourse.[8]

Further, the Complaint alleges that Petitioner separately appealed from the summary judgment, from the subsequent award of pre-trial expert witness fees as costs, from the denial of a prompt motion to set aside the summary judgment,[9] and from

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[8] Paragraph 23 of the Complaint reads:

> **23.** The right of appeal in civil actions in state courts is guaranteed under Cal. Code of Civil Procedure, § 904.1, and so it is protected against arbitrary or capricious denial under the Fourteenth Amendment. *Lindsey v. Normet* (1971) 405 U.S. 56, 77. Under Cal. Code of Civil Procedure § 437c (summary judgment statute), the trial court may dismiss a civil action, award costs, and so forth, without any finding of fact or opinion whatsoever, as it did in *Johnson I*. However, Cal. Const., art. VI, § 14, requires the court of appeal to provide a written reason for its decision. Accordingly, the right of appeal in Californian civil actions is especially vital to Plaintiffs faced with unexplained summary dismissals, because it is the *only* procedure whereby the state courts are required to state any particular reason for the denial of trial.

Lindsey found a violation of equal protection where the right of appeal was invidiously precluded on the basis of wealth by a state statute. Where, as herein, the causes of appeal preclusions are procedural mistakes, both due process and equal protection are offended. *Logan, infra.* See also *Kremer* and *Lolling*, p. 36 n. 43 below. In addition, the hearing of an appeal on its merits is required, both constitutionally and contractually, by virtue of the payment of a filing fee ($200 per notice of appeal) to the state courts. This fee is a taking of property, in exchange for the promise of the performance of a set of procedures. It is accordingly a double violation of due process where both: (a) the right of appeal is arbitrarily curtailed, despite the full performance of an appellant's obligations; and (b) the appellant, far from being reimbursed, is ordered to also pay the appellee's costs on appeal. Re the right of appeal being a procedural due process requisite under state law, see also *Ursino*, p. 23 n. 25.

[9] This was separately appealable because it was based on new facts incidentally divulged by Real Party after the summary judgment hearing.

a post judgment award of sanctions. The Complaint also alleges that each of these four appeals was dismissed without hearing due to nonjudicial or clerical mistake.

3. The eight-count federal Complaint.

It is the mistaken denial of hearings of his original four state appeals that Petitioner seeks to correct by the Complaint, and not the trial court judgments. He prays that the District Court order continuation of these appeals, without prejudice.

In eight counts, the Complaint alleges that the three state Defendants (hereafter "Defendants"), acting under color of state law and in their official capacities as justices of the California Court of Appeal, by order filed July 24, 1989, had with emphatic finality refused to correct any of their court's clerical mistakes by continuing the appeals, thereby depriving Petitioner of procedural due process, and consequently of property, in violation of the Fourteenth Amendment to the Constitution of the United States.[10]

The Complaint alleges an outrageous sequence of some twelve independent mistakes against Plaintiff by the state courts. The crux of the action is the challenge to the four mistaken dismissals of the original appeals, as respectively alleged in the first four counts, because the remedy sought is neither more nor less than the (sanctions-free) continuation of those four appeals. The mistakes complained of in the other counts should as a

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10 Petitioner had followed the state's provision to correct due process deprivations *evident on the face of the record* by collateral action. Defendants' final refusal to correct the prior mistakes arose in the disposition of such a collateral action, in appeal A043517. (The collateral action was *Johnson v. Bank of America*, San Francisco County Superior Court, case 889996.) The propriety of the collateral action was expressly recognized by the Defendants, before reaching their decision (p. 18 n.20 below) that no due process violations had been alleged.

consequence also be corrected by this sole remedy. The counts are as follows:[11]

First Count: Petitioner's appeal from summary judgment was mistakenly dismissed as untimely.[12]

Second Count: Petitioner's appeal from the award of pre-trial expert witness fees as costs was mistakenly dismissed as abandoned, whereas it was diligently perfected, up to and including the filing of the brief and record.[13]

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[11] Note well that the burdens of discovery and proof in the District Court are slight. (See *Haring*, 462 U.S. at 416: "How the facts are found will often dictate the decision of federal claims.") The alleged facts are strictly limited to the face of the record in the state courts, and comprise the ***stamped*** dates of filings, and the ***literal*** reading of statutes, formal motions, notices, and orders. See the next six footnotes for the root factual allegations. The Complaint is suggestively mischaracterized by the Ninth Circuit as requesting (p. 40 below) "a direct review of the various rules and procedures of his state court case," as though this amounted a judicial analysis. It is a nonjudicial or clerical analysis that the Complaint requests re the state courts' decisions.

[12] It is alleged that, in *Johnson I*: (**a**) the date of entry of the order denying the motion for new trial was July 3, 1985, which was confirmed by date stamp and by the trial court clerk's official Certificate; (**b**) Cal. Rules of Court, Rule 3a, provides that "the time for filing the notice of appeal [from a summary judgment] is extended for all parties until 30 days after . . . entry of the order denying the motion [for new trial]"; (**c**) the date of filing of the notice of appeal from the March 29, 1985 summary judgment was August 2, 1985; and (**d**) the court of appeal dismissed the appeal as untimely under said Rule 3a, and without comment refused both to reinstate the appeal or to explain its dismissal on prompt motion.

[13] It is alleged that, in *Johnson I*: (**a**) on December 13, 1985, Petitioner filed a timely notice of appeal from the final order (filed November 22, 1985) compelling payment of the Real Party's pre-trial expert witness fees; (**b**) Petitioner timely paid the $200 filing fee; (**c**) Petitioner vigorously opposed Real Party's motion to dismiss, which argued two points, neither of which was that the appeal had been abandoned; (**d**) Petitioner filed a timely brief and the record on appeal; (**e**) thereby Petitioner satisfied all the requirements necessary and sufficient to perfect his appeal; and (**f**) the court

Third Count: Petitioner's appeal from the order denying his motion to set aside the summary judgment was mistakenly denied on the ground that the Notice of Appeal did not include it, whereas it included it, by date, title, and subtitle.[14]

Fourth Count: Petitioner's appeal from an original post-judgment award of sanctions was mistakenly dismissed without the reason required by Cal. Const., art. VI, § 14.[15]

Fifth Count: Petitioner was ordered to pay Real Party's pre-trial expert witness fees against all precedent, by a court that refused to provide any special justification, as required under the due-process-based doctrine of stare decisis.[16]

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of appeal surprisingly dismissed the appeal as abandoned, and subsequently denied without comment a prompt motion to reinstate the appeal or to state what act or omission by the Plaintiff constituted abandonment.

[14] It is alleged that, in *Johnson I*: (**a**) Petitioner's August 2, 1985 Notice of Appeal complained of the "denial of Plaintiff's Motion to Set Aside Summary Judgment and Set Trial by order entered July 3, 1985"; (**b**) the trial court clerk's "Notice of the Filing of the Notice of Appeal," which was served on all parties and the court of appeal, stated that the order "entered 7/3/85 denying motion to set aside Summary Judgment" had thereby been appealed from; and (**c**) the court of appeal ruled that "The appeal from the July 3, 1985 post-judgment order is dismissed for failure to include the order in the notice of appeal," and denied without comment Plaintiff's prompt motion to reinstate the appeal from the included order or to explain its ruling.

[15] It is alleged that, in *Johnson I*: (**a**) the trial court had awarded sanctions against the Plaintiff for bringing a motion for reconsideration, and that the Plaintiff appealed both from the denial of reconsideration and from the award of sanctions; and (**b**) the court of appeal, without addressing the appeal from the award of sanctions itself, ruled that "Respondent's motion to dismiss the appeal from the order denying . . . reconsideration with sanctions is granted because the motions sought a new trial and are therefore nonappealable," and also denied without comment a prompt motion to reinstate the appeal from the award of sanctions, or to explain it.

Sixth Count: Petitioner was ordered to pay all costs claimed by Real Party, including a double-billed line item, and including a couple of line items which his uncontradicted affidavits attested were for services that were never rendered.[17]

Seventh Count: This alleges that Petitioner separately submitted and argued before Defendants that: (**a**) even assuming arguendo that each mistake *individually* did not violate due process, they *cumulatively* did so both because of their sum damage (the squelching of Petitioner's entire action and the award of disallowed, punitive costs), and because of a consequent prima facie statistical proof of bias;[18] and (**b**) Defendants completely ignored this count.

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[16] It is alleged that, in *Johnson I*: (**a**) the trial court awarded all Real Party's expert witness fees as costs, even though there had been no trial, nor had any expert witness testimony been submitted in the motion for summary judgment; (**b**) Real Party's expert witnesses were not appointed by the court; (**c**) Petitioner had pointed out, in motions to tax costs and for reconsideration, that the award of such pre-trial expert witness fees as costs was against binding precedent; (**d**) Real Party and court produced no contrary precedent; and (**e**) the trial court not only awarded these costs but also denied without comment Plaintiff's alternative motion requesting a special justification for the award. The Complaint also cites *Vasquez v. Hillary*, 474 U.S. 254, 266, 269 (1987) ("any departure from the doctrine of stare decisis demands special justification").

[17] It is alleged that, in *Johnson I*: (**a**) in his motions to tax costs and to reconsider the award of costs, Petitioner competently declared that specific line items were fictitious, stating that a billed interview with himself had not in fact occurred, and that another item was unreasonably billed twice; (**b**) the trial court ordered him to pay all line items nevertheless, and denied his motion requesting an explanation for awarding them; and (**c**) the trial court also denied Plaintiff's motion to compel the deposition of the person who generated the mistaken line items, who was in contempt of a subpoena that the Plaintiff had served for the purpose of corroborating his affidavits regarding these costs. In their July 24, 1989 order, Defendants deemed the award of this cost as "simply an excessive one, and is merely legal error."

[18] For fairness' sake, Real Party also should also have had a vital motion mistakenly denied as abandoned, or mistakenly denied as untimely, and so on.

Eighth Count: This alleges that in refusing to correct the state courts' mistakes, Defendants displayed prejudice against Petitioner's pro se status, and invidiously against his inability to afford counsel.[19]

The Complaint alleges that Defendants, by order entered July 24, 1989, recognized the procedural propriety of the collateral action for corrections, but ruled that the taken-as-true mistakes included no violation of due process, and that to contend so was frivolous, and they promised most severe sanctions should further litigation in the state courts ensue.[20]

If the state courts' decisions were unbiased, the probability of a dozen of their mistakes consecutively falling against the Petitioner would be one in two to the twelfth power, which is less than a one in four thousand probability. This amounts to a prima facie showing of bias, of unequal protection under the laws, and of lack of due process. Petitioner cited Proof of Fact (2d), Vol. 9, at 450-52 ("Most statisticians use 0.05 [1 in 20] as the level of significance . . . When the underrepresentation is statistically significant, it is inconsistent with the hypothesis of an unbiased selection procedure, and a prima facie case has been established.")

19 The Eighth Count alleges:

> **Invidious bias against lack of wealth.** In *Johnson I* Plaintiff attested that the action was originally prosecuted in court of law and pro se because: **(a)** he was refused an administrative remedy, because the facts raised no issues of discrimination based on sex, race, or religion, nor did they concern workplace safety; **(b)** he could not afford to pay hourly attorney fees on an ongoing basis; and **(c)** he was unable to find counsel to represent him on a contingency basis, as exemplified by Exhibit C [an attorney's rejection]. This shows that bias against Plaintiff's pro se status de facto discriminates against him because of his relative lack of wealth, which oppressively violates equal protection. *Lindsey, supra,* at 79.

20 Said order comprises Exhibit A to the Complaint. It is quoted from in the Complaint, as follows:

> None of the errors alleged were . . . in violation of due process. . . . [W]e must emphasize for appellant's benefit

Petitioner's subsequent petition to the California Supreme Court (No. S011874) was denied without hearing and without prejudice, so that the Defendants' decision became the state's final, highest-court determination of the cause. Petitioner also sought review by this court, and was denied without prejudice.[21] Petitioner had thus exhausted his remedies in and through the state courts, prior to filing his federal Complaint.

4. The federal case history.

Without the Defendants' appearance, and without a hearing, by judgment filed a week after the Complaint (August 23, 1991), the District Court sua sponte dismissed the entire Complaint for Prospective Injunctive Relief on the terse grounds that it had "absolutely no jurisdiction" over the decisions of state courts, and that judges were "absolutely immune from suit."

On September 6, 1991, Petitioner filed a motion to set aside or amend the dismissal, showing that District Court jurisdiction had been unequivocally upheld by this court in actions challenging state court decisions and naming judges as Defendants, provided that the relief sought was prospective and injunctive. Petitioner relied on *Mitchum* and *Pulliam*, *supra*, (cited in the Complaint), which explicitly affirmed such civil rights actions against state court decisions and having judges as Defendants. Plainly, the Petitioner showed that the District Court's two wholly *absolute* grounds for dismissal were erroneous, and that its two authorities were irrelevant.[22]

> that further litigation of these settled issues will certainly not be viewed as charitably in the future. Appellant should be aware that the patience of the courts is not inexhaustible. His continued misuse of judicial resources could cost him a great deal.

21 Case 89-1087, denied by order entered March 5, 1990.

22 The District Court's authorities were: *Victory Carriers Inc. v. Law*, 404 U.S. 202, 213 (1971); and *Forrester v. White*, 484 U.S. 219, 225-27

In the alternative, Petitioner moved that the dismissal be amended by further explanation addressing his two authorities affirming the availability of prospective injunctive relief against the official decisions of state judicial officers. The motion was denied within a week, by order filed September 12, 1991, prior to the set date for the ordinary hearing, but without comment.

Petitioner filed his Notice of Appeal in the Ninth Circuit on October 11, 1991. Without the Defendants having appeared, and without an oral hearing, by decision filed July 10, 1992 (Appendix 1 at pp. 39-41), the Ninth Circuit affirmed dismissal on the much narrower ground that Petitioner's having obtained a *final and judicial* decision in the state courts per se precluded the action in the District Court, as follows (p. 40):

> " '. . . [District Courts] do not have jurisdiction over direct challenges to final decisions of state courts, even if those challenges allege that the state court's action was unconstitutional.' " *Allah v. Superior Court*, 871 F.2d 887, 890 (9th Cir. 1989) (quoting *Feldman*, 460 U.S. at 486).

Understandably, the Ninth Circuit disregarded the District Court's erroneously absolute grounds for dismissal and irrelevant authorities, instead surprising Petitioner with two wholly new authorities, *Feldman* and *Allah*. Petitioner's adverse authorities, *Mitchum* and *Pulliam*, were simply ignored. Petitioner speculates that the Ninth Circuit deemed *Feldman* determinative because the decision of a state court of appeal was

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(1988). *Victory Carriers* did not even concern the review of a state court decision, or suits against judicial officers. It decided a very narrow venue question (when a pier should be construed as at sea versus on land), and was expressly limited to actions under the maritime jurisdiction statutes (28 U.S.C. §§ 1332, 1333), whereas the Complaint herein asserts federal question and civil rights jurisdictions under 28 U.S.C. §§ 1331, 1343. *Forrester* affirmed judicial immunity from suits *for damages*, not from suits for prospective injunctive relief.

therein also at issue.[23] However, the *Feldman* plaintiff failed to allege any procedural unfairness in the state court of appeal's decision, which was on the merits.

In his Petition for Rehearing and En Banc Suggestion, Petitioner pointed out that *Haring*, 462 U.S. at 317-18 (p. 30 below) provided that the preclusive effect of state litigation yielded where the state court procedures appeared to be unfair.

Further, Petitioner showed that the court's new authorities found a lack of jurisdiction re *substantive* due process deprivations, and that *Feldman affirms* the availability of actions in the district court to remedy deprivations due to final state court decisions where the original decision is of a *nonjudicial* character. Petitioner's brief had argued the nonjudicial or clerical nature of the state courts' mistakes, but the Ninth Circuit's decision overlooked this crucial distinction.

Further, as argued in depth below, Petitioner showed that this court's applicable *Parret/Hudson* line of cases, together with *England*, held that where *procedural* due process deprivations were at issue, a Petitioner conversely was required to exhaust his remedies through the state courts, as a strict prerequisite to filing a civil rights action in the District Court.

Further, Petitioner pointed out that the Ninth Circuit's ground for affirming dismissal simply did not apply to the Seventh and Eighth Counts, although they were based on substantive due process deprivations, *because they simply had not been adjudged by the state courts.*[24] In particular, the Eighth Count was based on an original allegation of bias in the making of the final state court decision.

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[23] In *Pulliam*, a judge was sued to enjoin an incarceration practice. In *Mitchum*, the plaintiff sought to enjoin a particular state trial court order.

[24] Neither the District Court nor the Ninth Circuit distinguished the counts, despite this point featuring in Petitioner's arguments, but the record implies findings against *Pulliam's* and *Mitchum's* application to these counts.

ARGUMENT

1. Rule 10(a) claim: The exercise of this court's power of supervision is warranted because the lower court has sanctioned gross departures from the accepted and usual course of judicial proceedings.

(i) The decision below evades constitutional duty.

As detailed in the below Rule 10(c) claim, the Ninth Circuit's decision requires that a state litigant either run to the federal courts for interlocutory relief whenever a state court makes a clerical mistake, which would be ridiculous, or surrender his Fourteenth Amendment procedural due process *guarantee* to the improbability of discretionary review by this highest court. The facts of this case exhibit what is unacceptably sanctioned by such evasive logic.

(ii) The state court mistakes are outrageous, and yet the federal courts' dispositions are perfunctory.

The first six counts (pp. 15-17 above) allege departures from usual judicial proceedings in the state courts which shock the sense of fairness and affront the dignity of the law. All the alleged mistakes made by the state courts were necessarily taken as true by the Defendants, who not only ruled that none of them violated of due process, but outrageously admonished that the claim that they included a violation of due process would be obviously frivolous to a real attorney. This admonition itself should be obviously frivolous to a real attorney, let alone to

three appellate justices rendering a final state decision on that very point of law, after briefing.[25]

Nevertheless, the passage of the civil rights Complaint through the federal courts could hardly have demonstrated less concern, even though each dismissal and denial was procedurally proper. As detailed above, within a week the District Court dismissed the Complaint sua sponte, without any hearing, and without the Defendants having appeared, on *absolute* grounds flatly contradicted by authorities cited in the Complaint, and it provided two plainly unsupportive authorities. In an even shorter time, and again without a hearing, the District

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25 Tellingly, it is alleged that Defendants' denied Petitioner's formal application for a transcript of the oral hearing. Re the four mistakenly dismissed appeals, Defendants' reasoned (July 24, 1989 order):

> Appellant next attacks the various dismissals of his appeals in *Johnson I* on grounds of untimeliness, abandonment, and failure to include the order appealed from in the notice of appeal. [[Please note the matter of the appeal from the award of sanctions is once again simply ignored.]] Once again, erroneous decisions as to the timeliness or improper application of procedural standards, whether committed by trial courts or at the appellate level, are mere errors of law not jurisdictional in nature. [Citations]. Assuming as true appellant's allegations of appellate error in this regard, there were no violations of due process.

The citations were specific to jurisdiction under certain state divorce and school code statutes, and so inapplicable (see *Mathews*, p. 25 n. 27 below). Neither Real Party nor Defendants cited a case in which an appeal had been mistakenly dismissed. Yet Petitioner briefed Defendants on state authorities holding that dismissals of appeals as untimely due to the mistake of the court indeed violated due process (e.g. *In Re Martin* and *Krug, infra)* and quoted *Ursino v. Superior Court*, 39 C.A.3d 611, 620-21 (1974): "to deprive petitioners of their right to have their appeal heard and determined [according to the rules] offends the concept of due process in both the procedural and substantive sense." *Ursino's* finding of a lack of due process did not even rise to the gravity of the deprivation of the right to a determination on the merits of an appeal, but affirmed the much weaker right to have a prescribed quorum of four adjudicators decide a certain form of appeal, rather than three.

Court summarily dismissed Petitioner's prompt motion to set aside the dismissal, which respectfully made these points, and it refused to amend the judgment by further explanation.

The Ninth Circuit unanimously dismissed Petitioner's subsequent appeal without an oral hearing, even though it relied fully on new authorities, and provided the substantially narrower ground for dismissal, that the challenged state court decisions were final and judicial. As detailed above and as reargued below under his Rule 10(c) claim, Petitioner pointed out fatal oversights in the decision in a Petition for Rehearing and En Banc Suggestion, but the petition and suggestion were unanimously denied without comment.[26]

Unfortunately, the Complaint and this Petition manifest an avoidance so ubiquitous as to now warrant this court's precious attention. Petitioner submits that a failure to exercise the power of supervision in this instance, given that this Petition represents his final national recourse, would be repugnant to the Constitution of the United States, and would offend the reputation of the courts of the United States.

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[26] While Petitioner's federal appeal was pending, one of the justices who dismissed it (Hon. Beezer) was party to an opinion which impliedly recognized that *procedural* due process claimants had a duty to exhaust state remedies. *Buckey v. City of Los Angeles*, 957 F.2d 652, 655 (1991):

> Because the claim would not be based on procedural due process, the question of the adequacy of post-deprivation remedies, so important in section 1983 cases involving only procedural due process deprivations, would be irrelevant. *Zinernon, [infra]*.

Headnote 4 declares that "Civil rights complaints are to be liberally construed," but the court herein refused to address the same controlling procedural-versus-substantive qualification.

(iii) The departures from accepted and usual judicial proceedings negate the very right to such proceedings, and their casual toleration is disrespectful of the Constitution and of the American Declaration.

At stake is a deprivation at the heart of the Fourteenth Amendment -- the right of a worker to be free of an employer's malicious and oppressive constraints, *at least after his time and away from the place of employment.* The right to work is in question, because a wage slave necessarily depends for his livelihood on a not unsatisfactory job reference.[27]

At issue are such elemental and drastic due process deprivations, that to sanction any of them puts back the clock of law to antique ages. Rome's populace celebrated the advance of civilization and republican government that came with a lowly clerk's publication of requisite dates for performing legal actions.[28] Yet the decisions below sanction the Defendants' official finding that such basic admittance errors made by a court are obviously not in violation of due process.

The Fourteenth Amendment was indisputably intended to guarantee access to the state courts' procedures to all persons,

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27 See, e.g., *Truax v. Raich*, 239 U.S. 33, 41 (1915):

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. [Citations.]

The private interest at stake is pertinent in weighing procedural due process claims. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

28 See PRO MURENA, X-XII (Cicero's speeches), Lord, Harvard U. P. (1937). A clerk's action opened the court to those unable to afford counsel:

> A clerk Gneaus Flavius . . . published the calendar enabling the people to distinguish court days, and plucked the plumage of their wisdom from the clever legal advisers.

See p. 33 n. 40 below re an analogous clerk's publication herein.

and especially to the disenfranchised.[29] Even those who argue against the subsequent judicial doctrine that recognizes claims based on *substantive* due process deprivations admit that the right to procedural due process is beyond question.[30]

Without disputing this procedural guarantee, the Ninth Circuit herein ruled that, having exhausted his remedies in the state courts, Petitioner's sole federal remedy had been his prior unsuccessful petition to this court. Whatever merit this theory may have had, in the days when a civil litigant had a right of direct appeal to this court, it surely has lost, now that the right is diluted to one of petition for review. Statistically, it is almost guaranteed that such petitions will *not* lead to a federal decision

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[29] From *Mitchum v. Foster*, 404 U.S. at 238-42, Petitioner quoted:

> It is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment "against state action, . . . whether that action be executive, legislative, or *judicial*" *Ex Parte Virginia*, 100 U.S. 399, 346 [1879]. . . . As Representative Lowe stated "The Federal Government cannot serve a writ of mandamus . . . upon state courts to compel them to protect the rights, privileges, and immunities of citizens. . . . Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution have been denied or impaired." Cong. Globe, 1st Sess., 374-76 (1871). This view was echoed by Senator Osborn: "If the state courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate . . ." *Id.*, at 653. And representative Perry concluded . . . "judges having ears to hear, hear not . . ." *Id.*, at App. 78. . . . The debate was not about whether the predecessor of § 1983 extended to actions of state courts, but whether this invocation was necessary or desirable.

Petitioner quoted even more explicit statements at Cong. Globe, 42nd Cong., 1st Sess., 365-66, 385, and Appendix 217.

[30] See, e.g., The History and Meaning of the Fourteenth Amendment, Meyer, Vantage Press (1977), especially at 187-200, 213-14.

on the merits. They are with high probability denied as a matter of discretion, and without prejudice.

Logic suggests that nonprejudicial denial by this court would *enhance* the jurisdictional mandate to the District Court, rather than having exactly the opposite effect of taking it away, since, after such denial, the District Court becomes the sole guarantor of a federal adjudication.[31]

Grossly affronted is the fundamental principle that, at a minimum, due process of law requires a "meaningful opportunity to be heard." On this point, Petitioner cited *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), in which this court definitively restated that no state can deprive a diligent applicant of meaningful access to remedial procedures owing to an admittance error *made by the state itself*, without violating due process and equal protection guarantees.

The *Logan* Plaintiff had filed a timely charge which the Illinois Fair Employment Practices Commission inadvertently dismissed as untimely. The question decided by this court was (at 424, emphasis added) "whether a state may terminate a complainant's cause of action because a state official, *for reasons beyond a complainant's control,*" made a mistake. Petitioner quoted *Logan* as follows (at 429-30):

> [T]he Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard on their claimed rights." [Citation.]

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31 This point would not apply to *substantive* due process deprivations, where the prior option of interlocutory decision in the District Court is available, and where in any case the law has the malleability of judicial doctrine. See pp. 35-37 below re the unavailability of this option to remedy procedural deprivations.

In general, *Logan* reiterated that, where errors of the court, in matters of law or in the interpretation of admitted evidence, are made in the course of a full and fair trial or judicial hearing *on the merits* of a cause, this constitutes *mere* error, and due process is procedurally sufficient. But where errors of the court preclude the opportunity for a full and fair trial or other judicial hearing *on the merits*, this constitutes *drastic* error, and constitutionally required procedure is lacking.

Petitioner also quoted *Boddie v. Connecticut*, 401 U.S. 371, 380-88 (1970), which compelled state courts to recognize a civil cause of action for dissolution of marriage, as follows:

> [T]he State's refusal to admit these appellants to its courts, the sole means in Connecticut of obtaining a divorce, must be regarded as the equivalent of denying them an opportunity to be heard on their claimed right to a dissolution of their marriages, and . . . a denial of due process.

It is pertinent that, in concurring opinions, other justices found a violation of equal protection based on invidious discrimination against those unable to afford costs.

Petitioner also cited the American Declaration of the Rights and Duties of Man,[32] art. II, V, XVIII, which provide:

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[32] Notwithstanding its present obscurity in federal jurisprudence, the American Declaration of the Rights and Duties of Man (Organization of American States Res. XXX (1948)) is binding on the United States. It has the status of an international treaty, and is part of the supreme law of the land under Article VI of the United States Constitution. See Protecting Human Rights in the Americas (3d 1990), by Buergenthal, pp. 4-8, 25-28, 486, 515. The O.A.S. Charter (21 U.T.S. pt. 1 p. 607, entered into force Feb. 27, 1970), at art. 112 authorizes the Inter-American Commission for Human Rights to investigate, report, and advise regarding alleged violations of the American Declaration. Petitioner respectfully reminds this court of his right to petition

> II. All persons are equal before the law . . .
>
> V. Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.
>
> XVIII. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violated any fundamental constitutional rights.

These mandate the civil right to a defamation cause of action at law. Because Petitioner herein seeks to redress the arbitrary deprivation of such a cause of action by acts of authority, the second part is a further grant of standing to Petitioner to bring this civil rights action in the District Court, and a further grant of jurisdiction to the District Court.

2. Rule 10(c) claim: The questions presented are important, and the decision below runs counter to the applicable decisions of this court.

That the questions presented are important has been shown under the above Rule 10(a) claim.

(i) The dismissal runs counter to Mitchum and Pulliam because the state decisions are not properly final.

The Ninth Circuit's reasoning and authorities apply expressly to § 1983 challenges to *final* decisions of state courts. Yet the Complaint seeks an order respectfully enjoining

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the Commission for an advisory opinion, after exhaustion of national remedies.

Defendants to *continue* appeals to their *proper* finality. No properly final decisions have yet issued in the state courts, due to the mistaken clerical dismissals, which are themselves void for lack of due process, and as a matter of law void Defendants' supposedly final order.[33] Accordingly, *Mitchum* and *Pulliam* apply without any preclusive relitigation restraint.

(ii) The dismissal runs counter to Haring because there is compelling cause to doubt the fairness of the state procedures.

The unfairness of state procedures is prima facie sufficient to qualify the Complaint as an exception to *Feldman's* preclusive rule, under *Haring*, 462 U.S. at 317-18:

> [Re a] § 1983 claim. As a general matter, even when issues have been raised, argued, and decided in a prior proceeding, and are therefore preclusive under state law, "redetermination of (the) issues (may nevertheless be) warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Montana v. United States*, 440 U.S. 147, 164, n. 11 (1979).[34]

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[33] This doctrine can be traced (through the Fourteenth Amendment) to Magna Carta (para. 52, 55). The Complaint quotes *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1979): "[J]udgment rendered in violation of [procedural] due process is void." Legal nullity cascades: an affirmance of a void order is itself void. (As in *Feldman* the federal court decided whether a state's decision was judicial, so it is for the federal courts to decide the question of finality.)

[34] In support of this proposition, *Montana* cites Restatement (2d) of Judgments § 68.1, and The Preclusive Effect of State Judgments on Subsequent 1983 Actions, 78 Colum. L. Rev. 610, 640-653 (1978).

Herein, there is much more than "reason to doubt" the fairness of the state court procedures. Systemic unfairness is not only manifest in the first six counts, but is an alleged fact in the Seventh and Eighth Counts, and so is presumed true.

(iii) Re the first six counts, the dismissal runs counter to Feldman because the mistakes are nonjudicial.

As aforesaid, the Ninth Circuit's decision relied entirely on *Feldman* and *Allah*. But, in both cases, the state court had *with procedural propriety and by exercise of judicial discretion* denied a Plaintiff's application. Both cases decisively depended on the alleged due process deprivations being *substantive*. *Allah* is otherwise unimportant.[35]

In *Feldman*, the original application to the state court of appeal was for a waiver from a qualification required to practice law, which was denied on the merits, after their due consideration, which included a hearing.[36] By petition, *Feldman* challenged the denial. The petition was denied. The decisive conclusion of the *Feldman* court was that the *original* decision of the court of appeal was judicial in character. This was adduced only after describing in detail (at 479-80) the substance of the rejected application, and thus of the state

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35 *Allah*, 871 F.2d 887 (1989), is a 3-page case which relies fully on *Feldman* (cited at 890 and twice at 891). In *Allah*, the application was for relief from a *procedurally proper* dismissal as a form of sanction, because the plaintiff failed to comply with a discovery rule. *Allah* held that the district court could not review a state court's dismissal for procedural technicalities, *where it was stipulated that the Plaintiff, and not the state court, had made a procedural mistake*. Despite concerning "procedural technicalities," *Allah* thus applied to substantive due process.

36 Note well that the Complaint alleges that the one hearing this Petitioner was given by the state court of appeals was expressly not on the merits, but to determine whether the court should award sanctions against him for frivolous litigation. (Even had it been on the merits, it would still not alter the nonjudicial nature of the original, challenged mistakes.)

court's deliberations. In so doing, *Feldman* affirmed that: an unconstitutional state court of appeal decision of a *nonjudicial* character is generally reviewable, even if made final by subsequent denial on the merits of corrective remedies; whether a decision is judicial is a question for the federal court to decide; and this question depends on the nature of the decision rather than on whether judicial officers make it. *Feldman*, at 476-79.

In citing several authorities on the distinction between judicial and nonjudicial decisions (at 477), *Feldman's* first-listed and most recent case was *Roudebush v. Hartke*, 405 U.S. 15, 20-22 (1972). In that case, a decision taken by a judicial officer was at issue, but the challenged decision was deemed nonjudicial, *and so reviewable in the District Court.* In particular, determining matters of form, such as timeliness and basic information content, was deemed "clearly" nonjudicial, as follows (at 21):

> The process of determining that the recount petition is correct as to form -- that it contains the proper information, such as the names and addresses of all candidates, and is timely filed -- is clearly not a judicial proceeding.[37]

Re the First Count, namely, the mistaken dismissal of a timely appeal as untimely, that such a determination is non-judicial is explicit in the above quote, and was decisive in *Logan, supra.* That this case is no subtle exception to the rule is plain from the fact that the filing date is in literal compliance

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[37] Likewise, under state law, an error is "clerical" even though made by the court, if it "cannot reasonably be attributed to the exercise of judicial discretion." *Bowden v. Green*, 128 C.A.3d 65, 71 (1982).

with the timeliness statute (p. 15 n. 12 above), which is per se sufficient to prove timeliness.[38]

Re the Second Count, namely, the mistaken dismissal of an appeal as abandoned when it was vigorously and without default prosecuted, the determination that the appeal is not abandoned is again an automatic administrative sort of process. There are five actions taken in order to perfect an appeal, all of which are matters of record, as detailed at p. 15 n. 13.[39]

Re the Third Count, namely, the mistaken dismissal of an appeal for failure to include the order in the notice of appeal, when in fact specified in it by title, date, and subtitle, this constitutes a determination of basic informational content, which *Roudebush* held to be clearly nonjudicial.[40]

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[38] Petitioner also cited two state cases in which the dismissals of appeals as untimely were voided for lack of due process, because the untimeliness was caused by the error of the court, namely, *In Re Martin*, 58 C.2d 133 (1962), and *Krug v. Meehan*, 108 C.A.2d 416 (1951). In both cases the appeals actually *were* untimely, according to the rules. When, as herein, an appeal actually *is* timely according to the rules, a dismissal due to the mistake of the court lacks due process under these precedents *a fortiori*.

[39] Petitioner cited a state case in which a judgment was voided because it had been entered on account of the filing of an unauthorized stipulation, namely, *Toy v. Haskell*, 128 C. 558 (1900), and two further cases that had voided judgments entered because of the failure of a party to respond, when in fact a response had been filed, namely, *Wilson v. Goldman*, 274 C.A.2d 573 (1969), and *A & B Metal Prod. v. MacArthur Properties Inc.*, 11 C.A.3d 660 (1970). These cases voided defaults caused both by mistaken action and omission, analogous to mistakenly adjudged abandonments. Understandably, Petitioner drew a blank on case law addressing the finality of mistakenly adjudged abandonment, without any act or omission given as cause.

[40] Herein, the clerk of the state trial court read the Notice of Appeal, and automatically notified the parties and the state court of appeal that appeal was taken from the order which that very court was unable discern in said notice, as detailed at p. 16 n. 14. Petitioner has found no appeals that have been analogously dismissed, but the closest precedent was ironically cited as authority in the dismissal of the appeal, namely, *Glassco v. El Sereno*

Re the Fourth Count, namely, the mistaken dismissal of an appeal from an award of sanctions without the required reason, whether an applicable reason is provided (without regard to the adequacy of an applicable reason) is surely a matter of informational content too trivial to be deemed an exercise of judicial discretion.[41]

As aforesaid, the first four counts represent the crux of the Complaint. But similar considerations apply to the Fifth and Sixth Counts. Re the Fifth Count, namely, the state court's award of pre-trial expert witness fees as costs, *given that the record contained no precedent in which this had been allowed, binding precedents disallowing them, and no special justification for them*, this would again seem to be a mistake of a nonjudicial nature, as it rests upon the determination of very basic information on the record. Re the Sixth Count, namely, the mistaken award of certain costs which uncontradicted affidavits declared to include a double-billed line item and a couple of line items for services not rendered, this again rests upon a determination of very basic information on the record.

Country Club, Inc., 217 C. 90 (1932). *Glassco* dismissed an appeal expressly for failure to ***even mention*** the order in the notice of appeal, and affirmed that a mere mention, however clumsily framed, would have been sufficient. Herein, two of the seven lines in the Notice of Appeal were taken up specifying the order. Perversely, Defendants had already moved against the appeal supposedly not appealed from, and the appeal court's dismissal of this appeal cited the order with far less specificity (merely by date) than did the Notice of Appeal. Further, Plaintiff pointed out the jurisdictional mandate of California Rules of Court, Rule 1, that the "notice of appeal shall be construed liberally in favor of its sufficiency." This surely promises a legal process in which the notice of appeal is read.

41 Regarding the unexplained dismissal of the appeal from an award of sanctions, Petitioner cited a case in which the California Supreme Court stressed that, with regard to an award of sanctions, ***any*** curtailment of basic procedural protections was an outright violation of due process, because of the grave, stigmatizing damage of sanctions. *In Re Marriage of Flaherty*, 31 C.3d 637 (1982). Further, the deprivation of personal property by state action is most direct in a state court's award of monetary sanctions ($400 herein).

(iv) Re the first six counts, the dismissal runs counter to England, Parret, Kremer, and Hudson because procedural due process claims require exhaustion of state remedies.

The Complaint alleges its first six counts per *original* mistake in the state courts, and the remedy sought is the continuation of Petitioner's *original* appeals. These counts cannot be construed as directed against a *judicial* decision merely because they attack the state courts' final denial of Petitioner's applications to set aside the original appellate dismissals. Thus, *Feldman* assessed the nonjudicial/judicial nature of the court of appeal's original decision, and not the nature of the subsequent decision not to reconsider it.

This nonjudicial/judicial analysis is reinforced by the parallel procedural/substantive analysis. Petitioner's arguments under the Fourteenth Amendment (re the first six counts) were indeed heard and decided by Defendants, but Petitioner had an obligation to exhaust his state court remedies as a prerequisite to filing this federal § 1983 action, because the original deprivations were of *procedural* due process.

As matters of comity and expedience, it is plain that the state courts should be presumed able, and are of course readiest, to correct their own nonjudicial or clerical sorts of mistake, on the proper application of an injured party. It would be ludicrous to require a state litigant to file a civil rights complaint in the District Court as soon as a state court made a clerical sort of mistake, and it would negate the Fourteenth Amendment and § 1983 if not to do so meant losing the right of redress in the District Court. Only as a last resort should an application for correction of a nonjudicial or clerical sort of mistake be made to a District Court.

This commonsense is strictly mandated by the *Parret-Hudson* line of cases, which require exhaustion of state court remedies prior to a federal § 1983 action, wherever a

procedural due process deprivation is the original state fault.[42] In these cases, this court deemed the requirement of exhausting state remedies so plain as to warrant throwing out § 1983 actions because the plaintiffs had not exhausted remedies available in the state *courts*, observing that due process would have been satisfied as long as those remedies were adequate.

Thus, *Kremer*, 456 U.S. at 485 concluded that a § 1983 plaintiff's failure "to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy."[43] This logic was reaffirmed in *Zinernon v. Burch*, 494 U.S. 113, 126 (1990):

> The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process.[44]

That such required proceedings in the state courts do not prejudice the right to a § 1983 suit in the District Court was decided in *England*, 375 U.S. 411 (1963), wherein plaintiff had reasonably exhausted his remedies in the state courts, in the course of which he urged his constitutional arguments, and

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[42] *Parret* was overruled in part in *Daniels v. Williams*, 474 U.S. 327 (1986), where the state's fault did not amount to a due process deprivation. As *Parret* noted 451 U.S. at 540, the "fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner.' " It is the deprivation of hearings that this Petitioner seeks to remedy.

[43] *Kremer*, 456 U.S. at 484 cited the state appeal procedure as evidence of procedural adequacy. In *Lolling v. Patterson*, 966 F.2d 230 (7th Cir. 1992), the court upheld dismissal of a § 1983 plaintiff because he had failed to appeal an adverse judgment to the state court of appeal.

[44] *Zinernon* reaffirmed *Parret* and *Hudson*, but was distinguished by virtue of an implicit challenge to state statutory controls. Herein, Petitioner complains of the abnormal and unforeseeable deprivation of his unchallenged statutory rights of appeal under Cal. Civ. Code § 904.1.

promised to litigate in the District Court if unsuccessful. This Petitioner acted identically. It was eminently reasonable, as well as required, for plaintiff to apply to the state courts that made clerical mistakes for correction, making full use of avaialable procedures, and he did expressly promise to litigate in the District Court if unsatisfied.[45]

(v) The Seventh and Eighth Counts have been decided counter to Mitchum and Pulliam because they have not been adjudged in the state courts.

The Seventh and Eighth Counts complain of *substantive* due process deprivation.[46] Accordingly, Petitioner does not dispute that their adjudication in the state courts would preclude a § 1983 action in the District Court. However, they have not been so adjudicated.

The Seventh Count alleges that the aggregation of taken-as-true procedural mistakes made by the state courts constitutes a prima facie proof of bias, in violation of Petitioner's equal protection and due process rights, on account of the highly significant statistical improbability that all such mistakes would fall against the Petitioner, and none against Real Party. This very different and separately stated cause of action was not even mentioned in any of the state court decisions,

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45 Petitioner has found no case in which, after the required exhaustion of state remedies under *Parret*, the District Court has disallowed a § 1983 action complaining of *procedural* due process deprivations. Theoretically, it could be argued that a postdeprivation procedure per se constitutes sufficient procedural due process, even if unsuccessful. If this is what this court intends, it should say so, because present law is otherwise. (In any case, Petitioner's Seventh and Eighth Counts would still stand, as argued next.)

46 See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926), which requires proof that complained-of state acts *considered as a whole* be "clearly arbitrary and unreasonable."

although Petitioner separately argued it. A real judicial determination of this count has yet to materialize.[47]

Certainly, the state court judgment was not responsive to this cause of action, and Defendants' failure to mention it, after Petitioner drew attention to its omission in a petition for rehearing, prima facie demonstrates an unwillingness to adjudicate it. Accordingly, it may be relitigated in the district court. *Robinson v. Ariyoshi*, 753 F.2d 1468, 1472-73 (9th cir. 1985), citing *Haring, supra.*

The Eighth Count alleges that Defendants were prejudiced against Petitioner's pro se status, *in the making of the concluding judgment* of the highest state court. No prior order or statement of any state court had made an issue of Petitioner's pro se status. This count is original to this action, not having been raised prior to the concluding state court decision. Accordingly, *Mitchum's* and *Pulliam's* allowance of suits against state courts and judicial officers for prospective injunctive relief applies without any preclusive relitigation restraint.

PRAYER

For the foregoing reasons, Petitioner prays that this court issue a writ of certiorari to review the July 10, 1992 and December 10, 1992 decisions of the United States Court of Appeals for the Ninth Circuit. He also prays that this court appoint counsel to represent him should a hearing be ordered.

Respectfully submitted,

_____ Date _____
Clifford Johnson, .
Petitioner pro se.

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[47] A written reason for dismissal is required in the state court of appeal. Cal. Const., art. VI § 14.

Appendix 1: July 10, 1992 Decision

FILED JUL 10 1992p
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-16626
D.C. No. CV-91-02625

CLIFFORD J. JOHNSON, Plaintiff-Appellant
v.
WHITE; MERRILL; STRANKMAN, Defendants-Appellees,
and
THE BANK OF AMERICA, Real-Party-In-Interest

Appeal from the United States District Court
for the Northern District of California
Marylin H. Patel, District Judge, Presiding

MEMORANDUM*

Submitted July 8, 1992**

Before POOLE, BEEZER, and KOZINSKY, Circuit Judges.

Clifford J. Johnson appeals pro se the district court's sua sponte dismissal of his action seeking judicial review of a prior state court proceeding which Johnson alleged violated his

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

constitutional rights under the fourteenth amendment. The district court dismissed the action for lack of subject matter jurisdiction. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, *Peter Starr Prod. Co. v. Twin Continental Films, Inc.*, 783 F.2d 1440, 1442 (9th Cir. 1986), and affirm.[1]

The United States district courts have subject matter jurisdiction over general challenges to rules promulgated by state courts in nonjudicial proceedings which do not require a review of a final state court judgment in particular cases. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983). " 'As courts of original jurisdiction, however, they do not have jurisdiction over direct challenges to final decisions of state courts, even if those challenges allege that the state court's action was unconstitutional.' " *Allah v. Superior Court*, 871 F.2d 887, 890 (9th Cir. 1989) (quoting *Feldman*, 460 U.S. at 486). This rule applies even though the direct challenge may be anchored to alleged deprivations of federally protected due process and equal protection rights. *Feldman*, 460 U.S. at 485; *Allah*, 871 F.2d at 891. The proper court in which to obtain a direct review of state-court determinations is the United States Supreme Court. 28 U.S.C. § 1257(a); *Allah*, 871 F.2d at 891.

Here, Johnson requested the district court to declare void an adverse judgment by the California Court of Appeals in his wrongful termination and defamation action. Because Johnson requested the district court to conduct a direct review of the various rules and procedures in his state court case, the district court lacked subject matter jurisdiction over his

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[1] An order dismissing a complaint is not generally a final appealable order. *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1171 n.1 (9th Cir. 1984). If, however, as here, the district court made it clear that it intended to dispose of the entire action because it could not be saved by amendment, it may be considered final and appealable. *See id.*

complaint. See *Allah*, 871 F.2d at 890. Accordingly, the district court properly dismissed the action.[2]

AFFIRMED.

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[2] Because the district court properly dismissed the action for lack of subject matter jurisdiction, we do not reach the issue of whether judicial immunity shields the state court judges from liability.

Appendix 2: December 10, 1992 Decision

FILED DEC 10 1992
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-16626
D.C. No. CV-91-02625

CLIFFORD J. JOHNSON, Plaintiff-Appellant
v.
WHITE; MERRILL; STRANKMAN, Defendants-Appellees,
and
THE BANK OF AMERICA, Real-Party-In-Interest

Appeal from the United States District Court
for the Northern District of California
Marylin H. Patel, District Judge, Presiding

ORDER

Before POOLE, BEEZER, and KOZINSKY, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.